BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THERESA E. GUERRERO	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,050,439
SEATON CORPORATION	)	
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the July 19, 2011, Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was found to have suffered a 15 percent whole person functional impairment followed by an 83 percent permanent partial general disability (work disability) after the ALJ found that claimant had suffered personal injury by accident which arose out of and in the course of her employment with respondent, and that claimant had provided respondent with timely notice of the accident.

Claimant appeared by her attorney, Mark E. Kolich of Lenexa, Kansas. Respondent and its insurance carrier appeared by their attorney, John A. Pazell of Lenexa, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. At oral argument to the Board, the parties stipulated that if this matter is deemed compensable then claimant has suffered a 15 percent whole person functional disability as the result of the alleged accident of December 28, 2008. Additionally, the parties stipulated that the award of the ALJ miscalculated the award for an 83 percent permanent partial general (work) disability. If the Board affirms that disability award then the amount of the total award will be the stipulated amount of $95,130.20. Also at oral argument to the Board, respondent conceded that notice was timely provided. That issue is no longer before the Board on this appeal. The Board heard oral argument on October 21, 2011. E. L. Lee Kinch, of Wichita, Kansas, was appointed as Board Member Pro Tem for the purposes of this appeal.

ISSUES

1. Did claimant's injury arise out of and in the course of her employment? Claimant was unable to provide an exact date for the alleged accident. Respondent contends that this casts serious doubt upon claimant's credibility. It was not until claimant was advised that she was to be laid off that she even requested medical treatment for her alleged injuries.

2. Had claimant reached maximum medical improvement (MMI)? Claimant was recommended for surgery, but was unable to undergo the recommended treatment due to ongoing coronary artery disease. Respondent contends that claimant is not at MMI and the matter should be remanded to the ALJ for further proceedings. Claimant contends that her condition is medically stable. If, however, her heart condition improves in the future, the recommended medical procedures can then be considered.

3. What is the nature and extent of claimant's injuries and disability? If this claim is found to be compensable and claimant is determined to have reached MMI then, respondent does not contest the ALJ's determination of functional impairment of 15 percent to the whole person. However, respondent does allege that the ALJ erred in finding that claimant had a work disability of 83 percent as the result of the alleged accident and injury. Claimant acknowledges a mathematical error in the calculation of the award by the ALJ, but argues that the award should otherwise be affirmed. Respondent agrees that a mathematical error occurred in the calculation of the ALJ's Award. The Board will properly calculate any award found to be due and owing in this matter.

Respondent argues that the ALJ's Award should be reversed because the claimant failed to meet her burden of proof by a preponderance of the evidence that she suffered personal injury by accident arising out of and in the course of her employment, that she failed to identify a date of accident and failed to prove that she had reached MMI. Respondent requests that the matter be remanded to the ALJ for further proceedings since claimant has not reached maximum medical improvement.

Claimant contends that the Award should be affirmed in all respects except to correct the error in the calculation of the Award.

FINDINGS OF FACT

Respondent which also goes by the name of Staff Management provides employees for another company, American Eagle Outfitters, (AE) a clothing manufacturer, where claimant was assigned. Claimant began working through respondent and for AE in October of 2008 as a material processor. Claimant's duties at AE included unloading trucks, putting boxes on conveyor belts and checking products inside those boxes. On or about December 28, 2008, claimant was asked by her lead person to find two certain boxes (master cartons for the products being brought in). Claimant found the boxes and was carrying them back when she tripped over a pallet of mats. Claimant fell forward onto another pallet of boxes and then pushed back from the boxes, falling onto the floor, striking her buttocks on the floor and her back against a pallet of matts. Claimant felt pain in her low back and was initially unable to move. Claimant was helped up and immediately reported the incident to her supervisor, Curtis Kraft. Claimant testified that Mr. Kraft then reported the accident to a manager at Seaton Corporation by the name of Brandon.[1] Claimant was not provided medical attention at that time. Claimant thought the accident occurred on or about December 28, 2008. She continued performing her regular duties. Claimant testified that she continued to experience pain in her low back during this time, including problems when bending.

In April of 2009, claimant was advised that she was to be laid off. At that point, claimant decided to seek medical treatment for her back. Claimant also decided to fill out the necessary paperwork to file a workers compensation claim. She was sent to Jo Anna McCalla, M.D., at Ransom Memorial Hospital in Ottawa, Kansas. Dr. McCalla sent her to physical therapy and water exercise for her back. The therapy did not help. By this time, claimant had been laid off, but was contacted by respondent and offered light duty. Dr. McCalla had given claimant a 15 pound lifting and carrying limit. From approximately May 2009 to her last day on April 13, 2010 claimant worked light duty.

Dr. McCalla referred claimant to neurosurgeon John D. Ebeling, M.D. Dr. Ebeling recommended surgery for claimant's low back and discussed injections in the low back as well. But, claimant is diabetic and testified that she cannot have the injections for that reason. Additionally, as claimant has ongoing coronary artery disease, she is also not a candidate for surgery at this time. Dr. Ebeling did recommend further studies, including a closed MRI scan, but this test was not performed. Instead, claimant was referred by respondent to Dr. Alexander Bailey, who determined that claimant had spondylolisthesis, severe facet disease and spinal stenosis, none of which he determined were related to claimant's work accident.

The matter went to preliminary hearing on June 16, 2010 and claimant was referred to board certified neurological surgeon Clifford Gall, M.D. Dr. Gall first examined claimant

[1] R.H. Trans. at 11.

on July 21, 2010. As the result of the examination, he opined that claimant may have a disc herniation or possible spinal stenosis. An MRI and x-rays of the lumbar spine were recommended.

At his next examination of claimant on August 13, 2010, he reviewed the MRI films, diagnosing spinal stenosis at L4-5 with milder stenosis at L3-4. Dr. Gall recommended laminectomies at L3 L4 and L5. He also speculated that the fall at work may have aggravated her condition. But, it did not cause it. Dr. Gall noted in his October 15, 2010 report that claimant was currently on an anticoagulation medication which would limit her surgical options. Claimant's cardiologist would not allow claimant to go off of her anticoagulation medication for at least one year. Dr. Gall also stated that an anesthesiologist would be reluctant to do even injections with claimant on the anticoagulation medication. He requested that claimant contact him in one year for possible further treatment decisions.

In his letter of November 3, 2010, Dr. Gall found claimant to be at MMI and rated her pursuant to the AMA Guides, 4th ed. at 15 percent of the whole person. He restricted claimant from heavy lifting or strenuous work with her back. But agreed that claimant was capable of returning to work within those restrictions. After reviewing the task list created by vocational expert Michael Dreiling, Dr. Gall opined that claimant was unable to perform 13 of the 22 tasks on the list for a 59 percent task loss.

Claimant was referred by her attorney to board certified emergency medicine and occupational medicine specialist P. Brent Koprivica, M.D. on October 23, 2010. The history provided is consistent with claimant's described injury on or about December 28, 2008. After reviewing numerous medical records and preforming a physical examination of claimant Dr. Koprivica diagnosed claimant with spinal stenosis and symptomatic spondylosis at L5-L6 [sic]. He also described claimant as being 5 foot 6 inches tall and weighing 22 [sic] pounds. He found claimant to be at MMI and noted that she was not a surgical candidate due to her ongoing use of anti-coagulation medication, which he described as being "not a permanent situation". However, he noted that claimant would have to be cleared by a cardiologist and weaned from the anti-coagulation medication before any surgery could be pursued.

Dr. Koprivica determined that claimant had a 22 percent whole person impairment under the AMA Guides, 4th ed. Claimant was restricted from lifting from floor level at any weight and could lift up to 20 pounds occasionally at waist level. Claimant was to avoid frequent or constant bending at the waist, pushing, pulling or twisting. Claimant was to avoid activities where jarring or whole body vibration is likely. In a follow-up letter dated April 16, 2011, Dr. Koprivica found claimant to have lost the ability to perform 16 of 22 tasks contained in the report of vocational expert Michael Dreiling. This results in a task loss of 73 percent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

Claimant described an accident on or about December 28, 2008 when she tripped over a pallet of mats, falling and injuring her low back. Claimant immediately told her supervisor, Curtis Kraft of the accident. This testimony is uncontradicted by any witness for respondent. Mr. Kraft did not testify in this matter.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[6]

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[2] K.S.A. 44-501 and K.S.A. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(a).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

This record supports a finding that claimant has proven by a preponderance of the credible evidence that she suffered personal injury by accident which arose out of and in the course of her employment with respondent on December 28, 2008. The award of the ALJ is affirmed on that issue.

Respondent argues that claimant has not reached MMI and the matter should be remanded to the ALJ for further proceedings, pending claimant's medical status. However, both Dr. Koprivica and Dr. Gall found claimant to be at MMI under these circumstances. While it is possible that claimant's cardiac condition may improve and she could become eligible for the recommended surgery, this is not a certainty. Should claimant improve and become eligible for and desire the surgery, then a review and modification action is available. For the purposes of this award at this time, the Board finds that claimant's condition is at MMI based upon the medical opinions of Dr. Koprivica and Dr. Gall.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[7]

There are only two task loss opinions contained in this record. Dr. Koprivica's 73 percent task loss opinion and Dr. Gall's 59 percent. The ALJ averaged the two, finding a task loss of 66 percent. The Board finds this record supports that finding and affirms same.

Claimant has not worked since leaving respondent's employment in April 2010. Therefore, under *Bergstrom*[8], she suffers from a 100 percent wage loss. In averaging the wage loss and task loss, the Board finds that claimant has suffered an 83 percent permanent partial general (work) disability which will be paid immediately after the 15 percent permanent partial general body functional impairment stipulated to by the parties.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified with regard to the calculation of the final award, but affirmed in all other regards.

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[7] K.S.A. 44-510e.

[8] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 19, 2011, should be, and is hereby, modified with regard to the calculation of the final award, but affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Seaton Corporation, and its insurance carrier, New Hampshire Insurance Company, for an accidental injury which occurred on December 28, 2008, and based upon an average weekly wage of $414.25.

The claimant is entitled to 62.25 weeks of permanent partial disability compensation at the rate of $276.18 per week or $17,192.21 for a 15% functional disability followed by 282.20 weeks of permanent partial disability compensation at the rate of $276.18 per week or $77,938.00 for a 83% work disability, making a total award of $95,130.21.

As of November 8, 2011 there would be due and owing to the claimant 144.40 weeks of permanent partial disability compensation at the rate of $276.18 per week in the sum of $39,880.39 for a total due and owing of $39,880.39, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $55,249.82 shall be paid at the rate of $276.18 per week for 200.05 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of November, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
John A. Pazell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge